No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

Petitioners,

—v.—

JOSEPH SAN FILIPPO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1994

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QUESTIONS PRESENTED

1. Whether a public employee's petition, like speech, must involve a matter of public concern to invoke First Amendment protection against discharge from public employment.

2. Whether the failure to "tread with a certain amount of care" is an insufficient degree of culpability to make a governmental entity liable under 42 U.S.C. § 1983 for the unconstitutional act of its nondecisionmaking subordinate.

3. Whether a First Amendment retaliatory discharge claim under 42 U.S.C. § 1983 requires a public employee to show that a public employer decisionmaker acted with purposeful intent to retaliate against him for his exercise of First Amendment rights.

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this Court and the names of all parties appear in the caption of this case.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Rutgers, The State University of New Jersey, states that it is a body both corporate and politic, pursuant to N.J. Stat. Ann. 18A:65-2 (West 1989), and that it has no parent or subsidiary corporations.

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IN THE

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No. ___

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

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Petitioners, Michael Bongiovanni, Anthony S. Cicatiello, Adrienne S. Anderson, Donald M. Dickerson, Floyd H. Bragg, and Norman Reitman, individually and as members of the Board of Governors of Rutgers, The State University, and Rutgers, The State University of New Jersey, respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 21, 1994.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is not reported (App. 56).[1] The opinion of the United States Court of Appeals for the Third Circuit, issued July 21, 1994, is reported at 30 F.3d 424 (App. 3). The order of the United States Court of Appeals for the Third Circuit, entered August 18, 1994, denying a petition for rehearing and suggestion for rehearing in banc, but which three Circuit Judges would have granted, is not reported (App. 93).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered July 21, 1994, the same date its opinion was issued (App. 1, 3).

A timely petition for rehearing and suggestion for rehearing in banc, filed August 3, 1994, was denied by the United States Court of Appeals for the Third Circuit by an order entered August 18, 1994 (App. 93).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

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[1] "App." refers to the Appendix to the Petition. "A" refers to the Appendix filed with the Third Circuit. "SA" refers to the Supplemental Appendix filed with the Third Circuit.

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

STATEMENT OF THE CASE

A. Proceedings Below

Respondent Joseph San Filippo, Jr. ("Dr. San Filippo") was a tenured chemistry professor at petitioner Rutgers, The State University of New Jersey ("Rutgers"), until he was dismissed for cause on May 13, 1988 by Rutgers' Board of Governors (the "Board"), six former members of which are petitioners

herein (A33 to 35 ¶¶ 2 to 9; A45 to 46 ¶ 22). Dr. San Filippo instituted this suit in the United States District Court for the District of New Jersey against Rutgers and the Board members who voted in favor of his dismissal, under 42 U.S.C. § 1983 and state law, alleging the dismissal violated his speech, petition, equal protection, and due process rights under the United States and New Jersey Constitutions, and violated his common law contract rights (A33 to 51).

The district court granted complete summary judgment to Rutgers and the Board members, determining as to the First Amendment speech and petition claims: (1) Dr. San Filippo's grievances and lawsuits did not involve matters of public concern and, thus, were not protected activity under the First Amendment petition clause (App. 73-83); (2) Dr. San Filippo's alleged speech involved matters of public concern and, thus, was protected activity under the First Amendment speech clause (App. 83-84); (3) Dr. San Filippo could establish a causal nexus between his protected speech and the Board's dismissal of him by a mere showing of a temporal proximity between the speech and the dismissal (App. 84-87); and (4) Rutgers showed that Dr. San Filippo was dismissed for the nine incidents of misconduct, detailed in the Board's decision, which were completely unrelated to speech, and Dr. San Filippo could not establish that the articulated reasons were pretextual (App. 87-91).

The Court of Appeals for the Third Circuit vacated the district court's summary judgment grant on the First Amendment petition and speech claims and remanded for further proceedings. First, contrary to seven other courts of appeals, two members of the panel determined that a public employee's petition need not involve a matter of public concern to state a First Amendment retaliatory discharge claim under 42 U.S.C. § 1983 (App. 21-39). Circuit Judge Becker, dissenting on this issue, would have followed "the reasoning of the other circuits . . . and the inexorable logic of *McDonald v. Smith*, 472 U.S. 479 (1985)" (App. 50-53). Second, the court of

appeals held that "deliberate indifference" sufficient to impose 42 U.S.C. § 1983 entity liability upon Rutgers could be established by a showing that the decisionmaking Board, even though it made its own dismissal decision on the basis of independent fact hearings and findings, failed to "tread with a certain amount of care" as to Dr. San Filippo's assertions that his nondecisionmaking chemistry professor colleagues were motivated by his First Amendment activities in their recommendation that dismissal proceedings be instituted (App. 6, 43-44, 44n.26). Third, the court of appeals held that the degree of culpability necessary to establish a First Amendment retaliatory discharge claim against the decisionmaking Board under 42 U.S.C. § 1983 is deliberate indifference, defined as a failure to "tread with a certain amount of care"—which could be established by a showing that the decisionmaking Board, even though it made its own dismissal decision on the basis of independent fact hearings and findings, failed to "tread with a certain amount of care" as to Dr. San Filippo's assertions that his nondecisionmaking chemistry department colleagues were motivated by his First Amendment activities in their recommendation that dismissal proceedings be instituted (App. 6, 43-44, 44n.26).

Following the issuance of the Third Circuit's panel decision, Rutgers and the Board members filed a petition for rehearing and suggestion for rehearing in banc, regarding the novel legal determinations made by the panel, which are contrary to this Court's precedent, the Third Circuit's precedent, and to the law established in the majority of the other circuits. Although the petition for rehearing was denied, Circuit Judges Becker, Hutchinson, and Scirica would have granted a rehearing (App. 94).

B. Facts

In the Fall of 1985, a janitor at Rutgers expressed grave concern to a Rutgers officer that Dr. San Filippo was mistreating visiting Chinese scholars (A129). A preliminary

investigation to determine whether there was any basis for the janitor's report and any cause for concern resulted in two research scholars, Changhe Xiao and Hetian Gao, and one professor, Yaru Zang, all visiting from the People's Republic of China at Dr. San Filippo's invitation and working in Dr. San Filippo's laboratories at Rutgers, coming forward with their complaints about mistreatment by Dr. San Filippo (App. 199-233, A129-130, 345-360). They had not come forward until the janitor's report prompted them, due to their fear of Dr. San Filippo (App. 231; A359-360).

The authenticity of a letter of recommendation purportedly emanating from a Chinese university, and the propriety of Dr. San Filippo's having hired Peng Zhou in 1984, as a "post-doctoral" fellow funded by an NSF grant, were already under review in early 1985, by a Rutgers graduate program and Dr. San Filippo's department, upon Dr. San Filippo's submission of application materials for Peng Zhou for admission to graduate school to pursue a doctoral degree (A338-342, 388-399, 422-428, 451-452, 486, 496-500, 502, 569, 578).

After the complaints of the visiting Chinese scholars and professor were brought to Rutgers' attention in the Fall of 1985, other questionable conduct of Dr. San Filippo was brought to Rutgers' attention: (1) a Rutgers stockroom clerk informed Rutgers of Dr. San Filippo's abusive treatment of Zong Ping Chen, a graduate student and Dr. San Filippo's research advisee, while Ms. Chen was teaching a class in March 1986 (A369-387, 401-404, 571, 573, 575-576; SA3-5); (2) a Rutgers technician informed Rutgers, in February 1986, through testimony in a lawsuit, that Dr. San Filippo had authorized payment of wages for time not worked (A165-167, 169-174); (3) Rutgers was informed, by the submission of time reports for the payment of wages by Cong Yuan Guo, Zhen-min He, and Peng Zhou in January 1986, that Dr. San Filippo had permitted unauthorized persons to work in his Rutgers laboratories (A361-364, 405-411, 548, 550).

After the initial allegations of Dr. San Filippo's mistreatment of visiting Chinese scholars came to light, Dr. San Filippo's dean told him and his union counsellor of the allegations at a meeting in November 1985 (A471). Dr. San Filippo generally denied everything, but demanded the allegations be reduced to writing (A126, 178 to 181, 471). The dean obliged with a January 1986 letter to which Dr. San Filippo responded in writing, admitting many of the facts, but denying that what he had done was wrong (App. 194; A475-488).

Pursuant to Rutgers' regulations (App. 236-237), recommendations as to whether dismissal proceedings should be commenced was obtained from two separate groups of Dr. San Filippo's faculty peers and three academic officers of the University (App. 183-193) before formal charges were made by Rutgers' President (App. 178-182). The regulations expressly provide that such recommendations are to be made "without discrimination because of . . . views on any subject" (App. 237). The regulations also provide: "[T]he faculty member, as a private citizen, enjoys the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of those rights." (App. 236).

Pursuant to Rutgers' regulations, Dr. San Filippo was afforded a hearing, which lasted 46 days, before a hearing panel of five tenured faculty peers, selected by lot and subject to challenges for cause and peremptory challenges (App. 237-238). No member of the hearing panel was from the chemistry department and no member of the hearing panel is alleged by Dr. San Filippo in this lawsuit to have retaliatory motives (App. 44, 100). Dr. San Filippo was represented at the hearing by attorneys of his own choosing, whose fees were paid by Rutgers (App. 238). Thereafter, the hearing panel rendered a 44-page written decision setting forth its fact-findings and recommending Dr. San Filippo's dismissal (App. 149-177).

The decisionmaking Board considered, in rendering its 60-page decision: (1) the record of 46 days of hearings before the hearing panel, which consisted of 5800 transcript pages of testimony of 33 witnesses and over 400 exhibits; (2) the hearing panel report; (3) a 417-page written brief and oral argument by Dr. San Filippo's attorneys; and (4) an "amicus" brief by Dr. San Filippo's union (App. 101-106).

Not one of the recommendations for the institution of dismissal proceedings, the President's charges, or the hearing panel decision, nor the Board's opinion itself, stated or implied that dismissal proceedings should be commenced, or Dr. San Filippo should be dismissed, for anything other than the misconduct expressly alleged, charged, and proven (*i.e.*, not one reference was made to Dr. San Filippo's alleged First Amendment activities) (App. 95-193).

As stated by the Board in its 60-page decision, the Board decided to dismiss Dr. San Filippo for the misconduct alleged, charged, and proven, as found by the five-member faculty hearing panel after 46 days of hearing: (1) compelling visiting Chinese research scholars, Mr. Xiao and Mr. Gao, to perform gardening and cleaning work at his home; (2) failing to arrange for health benefits for Mr. Xiao despite his promise to do so and his deduction of money from Mr. Xiao's salary for the express purpose of purchasing health benefits; (3) threatening and harassing Mr. Xiao, Mr. Gao, and other visiting Chinese scholars; (4) treating a Chinese teaching assistant and graduate student, Ms. Chen, in an unprofessional, threatening, and abusive manner; (5) directing the uninsured Mr. Xiao, injured when he fell from a ladder while cleaning windows at Dr. San Filippo's house, to permit himself to be identified as the insured Mr. Zhou to obtain treatment at a hospital; (6) authorizing a false time report by a subordinate employee to permit wage payment for time not worked; (7) hiring Mr. Zhou as a postdoctoral fellow to be paid on a National Science Foundation grant while knowing Mr. Zhou did not have a doctoral degree; (8) submitting to a graduate school admis-

sions office, on behalf of Mr. Zhou, a letter appearing to be, but which Dr. San Filippo knew in fact was not, prepared and signed by one Liu Guozhi of Changchun Institute; and (9) permitting three Chinese graduate students, who were not authorized to do so, to work in his Rutgers laboratories (App. 95-148).

During the hearings, Dr. San Filippo introduced evidence of his alleged First Amendment activities (speech, grievance, lawsuits), evidence that two other faculty members had had students help at their homes, and evidence of his department colleagues' alleged personal vendetta against him. Dr. San Filippo's attorney argued to the Board that such evidence demonstrated that his department colleagues' recommendation of dismissal proceedings (App. 193) was improperly motivated. This contention was addressed by the Board's decision as involving "factual issues which involve . . . determinations of credibility (including motives for testifying) and relevance," which "determinations are the responsibility of the [hearing] Panel," and the "Panel neither shirked its responsibility in this regard nor made findings which lacked the necessary factual predicates" (App. 132).

Dr. San Filippo's First Amendment claim in this lawsuit is that the recommendation by his chemistry department colleagues that dismissal proceedings be instituted was motivated by his alleged First Amendment activities (speech, grievance, lawsuits) and that this alleged unconstitutional motivation should be imputed to both Rutgers and the decisionmaking Board in its decision to dismiss him.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit holding that a public employee's petition, unlike speech, need not involve a matter of public concern to invoke First Amendment protection against discharge from employment is in direct conflict with the decisions of seven other courts of appeals, is plainly inconsistent with the Court's controlling principles established by *Connick v. Myers*, 461 U.S. 138 (1983), and *McDonald v. Smith*, 472 U.S. 479 (1985), involves an important First Amendment question, and involves an important issue affecting the public interest.

The Court has long held that a public employee cannot state a First Amendment retaliatory discharge claim on the basis of speech that does not involve a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 143-147 (1983), citing *Pickering v. Board of Education*, 391 U.S. 563 (1968), its antecedents, and its progeny. Only when a public employee speaks as a citizen on matters of public concern and not as an employee on matters of personal interest does his or her activity rise to the level of protected First Amendment activity. *Connick*, 461 U.S. at 147.

> The repeated emphasis in *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)] on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

461 U.S. at 143.

> Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for

> the government. This does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

461 U.S. at 147.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

461 U.S. at 146.

The Court held, in *McDonald v. Smith*, 472 U.S. 479, 485 (1985), that unprotected speech is not transformed into protected First Amendment activity under the Petition Clause simply by clothing the speech in a petition to the government. The rights and guarantees under the Free Speech Clause and the Petition Clause of the First Amendment are "cut from the same cloth" and "are inseparable," the Petition Clause conferring no "special First Amendment status." 472 U.S. at 482, 485. Thus, "there is no sound basis" for granting greater First Amendment protection to a petition—whether a letter to the President, as in *McDonald*, or a lawsuit complaint, as here—than to "other First Amendment expressions." 472 U.S. at 484-85.

The eight other courts of appeals that have addressed the issue—seven by decision, one by dictum—have linked the controlling principles of *Connick* and *McDonald* to conclude that, like speech, a petition to the government, be it a letter or grievance to the government employer or a lawsuit, must involve a matter of public concern to constitute the protected First Amendment activity necessary to establish a First Amendment retaliatory discharge claim. *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir.), *cert. denied*, 114 S. Ct. 185 (1993); *Rathjen v. Litchfield*, 878 F.2d

836, 841-42 (5th Cir. 1989); *Day v. South Park Independent School District*, 768 F.2d 696, 699-703 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *Rice v. Ohio Dept. of Transportation*, 887 F.2d 716, 720-21 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990); *Gray v. Lacke*, 885 F.2d 399, 412 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988);*Phares v. Gustafsson*, 856 F. 2d 1003, 1009 (7th Cir. 1988); *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 418-20 (7th Cir. 1988); *Altman v. Hurst*, 734 F.2d 1240, 1243-44 and 1244n.10 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984); *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.), *cert. denied*, 469 U.S. 823 (1984); *and see Boyle v. Burke*, 925 F.2d 497, 505-06 (1st Cir. 1991).

The Third Circuit held that a public employee's petition, unlike speech, need not involve a matter of public concern to invoke First Amendment protection against discharge from employment. Thus, its decision stands directly in conflict with these seven other courts of appeals as expressly stated by the majority in the court's opinion: "Recognizing that the question is a difficult one, we find ourselves unable to subscribe to the reasoning of our sister circuits" (App. 31). Further, the majority made the unprecedented distinction between a petition to the government that contemplates a response, *e.g.*, a lawsuit or a grievance, and one that does not, holding the former a protected First Amendment activity, even if it does not involve a matter of public concern, as long as it is "non-sham" (App. 35-39). This distinction is contrary to the Court's consideration, in *McDonald*, 472 U.S. at 484-485, of lawsuits and letters to the President on equal footing as petitions to the government.

Judge Becker's dissenting opinion on this issue provides good reason as to why this Court should review the decision below:

> I need not offer extended justification for my position, for the majority has already done so when describing these other circuits' views at pages 19 to 33 of its opinion. Although the majority then arrives at a conclusion in contradistinction to its preceding analysis, the majority's rationale supporting its conclusion pales by comparison with the reasoning of the other circuits and with the inexorable logic of *McDonald v. Smith*, 472 U.S. 479 (1985).
>
> . . . .
>
> In my view, the Supreme Court would be surprised to learn that, although, as a result of "the nature of the government's mission as employer," a public employer (such as Rutgers) can fire someone who "begins to say or do things that detract from the agency's effective operation" so long as the speech is on a matter of private concern, *Waters v. Churchill*, 62 U.S.L.W. 4397, 4401 (May 31, 1994) (quoted in Majority Typescript at 33), the government cannot fire the same individual if he or she speaks after invoking a formal mechanism for the redress of grievances (or speaks through that forum). Such an interpretation of the Petition Clause, rather than making that clause a "trap for the unwary" as the majority contends would be the consequence of my interpretation of the Clause, Majority Typescript at 35, is an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined. This would undermine the government's special role as an employer.

(App. 50-51).

The decision of a majority of the panel below also produces the anomaly that lawsuits and grievances which do not involve matters of public concern are protected First Amendment activity sufficient to establish a First Amendment retaliatory discharge claim, but testimony given in connection

with such lawsuits and grievances is not protected First Amendment activity unless such testimony involves matters of public concern. Under the decisions of the Court and several courts of appeals, testimony before a government fact-finding body is a form of speech and, thus, protected First Amendment activity for the purposes of a public employee's retaliatory discharge claim, only when it involves matters of public concern. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (holding that a teacher's testimony before legislative committees concerning the state's education policies was protected speech under the First Amendment where it involved matter of public concern). *Accord Piesco v. City of New York*, 933 F.2d 1149, 1156-57 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); *Reeves v. Claiborne County Bd. of Ed.*, 828 F.2d 1096, 1100-01 (5th Cir. 1987); *Patteson v. Johnson*, 721 F.2d 228, 232-33 (8th Cir. 1983); *Langley v. Adams County*, 987 F.2d 1473, 1478-79 (10th Cir. 1993); *Martinez v. City of Opa-Locke*, 971 F.2d 708, 712 (11th Cir. 1992).

Left unreviewed, the Third Circuit decision is a harkening bell to every public employee within the purview of the Third Circuit—especially those whose employment performance is questionable—to formulate every private concern as a grievance or lawsuit in order to provide a First Amendment shield against adverse employment action in the future. Nor is this fear unjustified in view of the unprecedented statement of the majority of the panel below: "The First Amendment's petition clause imposes upon the United States an obligation to have at least some channel open for those who seek redress for perceived grievances" (App. 35). Thus, the Third Circuit decision ignores *Connick*'s warning that "one employee's dissatisfaction" with an adverse personnel decision should not "plant the seed of a constitutional case." 461 U.S. at 148-49.

If this reasoning is permitted to stand, every public employer in the Third Circuit contemplating the discharge of a public employee who has previously filed a grievance or lawsuit regarding any conceivable matter of private concern

will now have to balance the monetary cost to the public of a costly, full-scale defense of the First Amendment retaliatory discharge claim that almost certainly will follow against the monetary cost and disservice to the public of retaining an employee whose nonprotected misconduct or employment performance warrants termination, even in cases where that misconduct has been found to cause harm to others.

II. The Third Circuit holding that a governmental decisionmaker's failure to "tread with a certain amount of care" is a sufficient degree of culpability to hold a governmental entity liable under 42 U.S.C. § 1983 for the isolated unconstitutional acts of its nondecisionmaking subordinate conflicts with the Court's precedent established in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Canton v. Harris*, 489 U.S. 378 (1989), involves an important constitutional question, and involves an important issue affecting the public interest.

The Third Circuit decision holds that Rutgers is liable under 42 U.S.C. § 1983 if its policymaking, decisionmaking Board failed to "tread with a certain amount of care" as to Dr. San Filippo's assertions that his department colleagues—nonpolicymaking and nondecisionmaking subordinates—were motivated by his First Amendment activities in recommending that dismissal proceedings be commenced (App. 6, 43-44, 44n.26). Although the Third Circuit purported to apply the "deliberate indifference" standard of fault established by the Court in *Canton v. Harris*, 489 U.S. 378 (1989), its use of the phrase failure to "tread with a certain amount of care" describes instead a simple negligence standard.

The Third Circuit decision both removes the causation and lessens the degree of fault necessary to hold a public entity liable for the alleged unconstitutional acts of its subordinates, contrary to the Court's precedent.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that a governmental entity can be found liable under 42 U.S.C. § 1983 only when that entity itself causes the constitutional violation at issue.

> [I]t is when "execution of a government's policy or custom . . . inflicts the injury" that the government as an entity is responsible under § 1983.

436 U.S. at 694. In so holding, the Court expressly rejected the respondeat superior theory of liability for holding governmental entities liable for the unconstitutional actions of its nonpolicymaking employees. 436 U.S. at 694-95.

In developing the contours of governmental liability under § 1983 in subsequent cases, the Court consistently has adhered to *Monell*'s fundamental premise—that liability may be imposed on a governmental entity only for injuries caused by a government policy or custom. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, the Court held that a municipality could not be held liable for a single isolated incident of excessive force by a city police officer because there was no proof that the incident was caused by a municipal policy or custom.[2] 471 U.S. at 823-25. In so holding, the Court rejected

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[2] In *Tuttle*, the Court distinguished cases where a governmental entity could be held liable under § 1983 for an isolated unconstitutional act. In those cases, the unconstitutional act was an application of an unconstitutional policy which clearly mandated that application. 471 U.S. at 822. As examples, the Court compared *Monell*, where the policy at issue, by its terms, unconstitutionally compelled pregnant employees to take mandatory leaves of absence before such leaves were required for medical reasons, with *Tuttle*, where the policy at issue was the training of police officers which did not mandate the use of excessive force. 471 U.S. at 822-23. The Court stated that the causal link between the policy and the unconstitutional act in *Tuttle* (a shooting by a police officer) was far more nebulous and much further removed than the policy and act in *Monell*, and thus, the governmental entity in *Tuttle* could not be held liable for the single act, like the governmental entity in *Monell*. 471 U.S. at 822-24.

Here as in *Tuttle*, there is no express policy that mandates retaliation against persons who exercise First Amendment rights. To the contrary,

the trial court's jury instruction from which the jury could infer from the single use of excessive force that the action was attributable to inadequate training or supervision amounting to deliberate indifference chargeable to the entity.

> We think this inference unwarranted; first in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning that state of mind of the municipal policymakers . . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional, policy which policy can be attributed to a municipal policymaker.

471 U.S. at 821, 824. Thus, only from a series of past unconstitutional acts by nonpolicymaking subordinates is it permissible to infer that the entity was aware of such conduct and, through deliberate indifference, condoned and authorized future unconstitutional acts by its subordinates.

In *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Court applied *Monell* to a 42 U.S.C. § 1983 action where the plaintiff alleged that his supervisors effected a job transfer and layoff in retaliation for his exercise of First Amendment rights. The Court held that, even if the plaintiff's allegations were true, the municipality could not be held liable under § 1983 unless its policy or custom caused the retaliatory actions through either (1) having a promulgated or articulated policy of retaliation or a practice of such retaliation, (2) authorizing the supervisors who transferred him to establish city policy

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Rutgers' regulations prohibit those making recommendations for the institution of dismissal proceedings from discriminating on the basis of "views on any subject," and further expressly provide that: "[T]he faculty member, as a private citizen, enjoys the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of those rights." (App. 236-237). Thus, like the government entity in *Tuttle*, Rutgers cannot be held liable for an isolated unconstitutional act allegedly committed by its nonpolicymaking subordinates.

with respect to transfers and layoffs, (3) expressly approving a policy statement of retaliation in which the supervisors cast their decision regarding the plaintiff, or (4) a series of past retaliatory actions by the supervisors which manifested an unconstitutional "custom or usage." 485 U.S. at 127-30. The plaintiff, having proved none of these, could not prevail in holding the city liable under § 1983. 485 U.S. at 129-30. The *Praprotnik* Court held that only if the authorized policymaker approved both the subordinate's decision and the unconstitutional basis for it could the entity be held liable. 485 U.S. at 127.

In *Canton v. Harris*, 489 U.S. 378, 385 (1989), the Court continued to adhere to the view that a governmental entity is only liable under § 1983 for unconstitutional acts it causes. The "deliberate indifference" standard of causation that this Court established in *Canton* provides that a governmental entity may be held liable under § 1983 only if it is deliberately indifferent to the constitutional rights of persons with whom its employees come into contact and the deliberate indifference actually causes the injury to those constitutional rights. 489 U.S. at 388-90. To make clear the narrow scope of governmental liability under this standard, the Court provided two examples which illustrate that a governmental entity is liable only when injury results because it ignored either a widespread pattern of unconstitutional violations committed by its employees or an obvious need to train its employees not to violate constitutional rights at the outset:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force [citation omitted] can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

489 U.S. at 390n.10; *see also* 489 U.S. at 396-97 (O'Connor, J., concurring).

The Third Circuit has rendered a decision that stands in clear conflict with the foregoing precedents of the Court. The Third Circuit has held that if any nondecisionmaking subordinate had an unarticulated retaliatory motive in recommending dismissal, the actual dismissal decision by the decisionmaking Board, even though based on independent fact findings after an evidentiary hearing by a separate hearing panel whose members admittedly had no retaliatory motive, is tainted thereby, if the decisionmaking Board did not fulfill a duty to "tread with a certain amount of care" as to Dr. San Filippo's assertions of isolated unconstitutional acts by nonpolicymaking subordinates. What is required to find that a governmental entity did "tread with a certain amount of care" is left undefined.

By so holding, the Third Circuit has created a new standard of governmental liability, for which only negligence is required and a causal relationship between the entity's policy or custom and the injury is not required. Its decision is in direct conflict with this Court's decisions requiring the entity's policy or custom to have caused the injury and requiring a custom to be established by a showing of deliberate indifference—not negligent indifference—to a pattern of conduct—not an isolated act—of nonpolicymaking subordinates.

The reasons that the Court stated in *Canton* for not permitting entity liability under 42 U.S.C. § 1983 absent deliberate indifference and causation provide equal reason for not permitting the Third Circuit decision to stand unreviewed:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. See *Oklahoma City v. Tuttle*, [471 U.S.] at 823 (opinion of Rehnquist, J.). Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities—a result we rejected in *Monell*, 436 U.S. at 693-694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism. *Cf. Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976).

489 U.S. at 391-92.

> § 1983 is not a "federal good government act" for municipalities. Rather it creates a federal cause of action against persons, including municipalities, who deprive citizens of the United States of their constitutional rights.
>
> Sensitive to these concerns, the Court's opinion correctly requires a high degree of fault on the part of city officials before an omission that is not in itself unconstitutional can support liability as a municipal policy under Monell.
>
> . . . .
>
> . . . . As the authors of the Ku Klux Klan Act themselves realized, the resources of local government are not inexhaustible.

489 U.S. at 396, 400 (O'Connor, J., concurring).

III. The Third Circuit holding that a First Amendment retaliatory discharge claim under 42 U.S.C. § 1983 does not require a public employee to show that a public employer decisionmaker acted with purposeful intent to retaliate against him for his exercise of First Amendment rights conflicts with the Court's precedent established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Connick v. Myers*, 461 U.S. 138 (1983), involves an important constitutional question, and involves an important issue affecting the public interest.

The court of appeals below held that Dr. San Filippo could establish his First Amendment retaliatory discharge claim against the members of the decisionmaking Board by a showing that the Board, in deciding to dismiss Dr. San Filippo on the basis of independent fact-findings made after 46 days of hearings before an independent hearing panel, failed to ' "tread with a certain amount of care" ' as to Dr. San Filippo's assertions to the Board that his department colleagues' recommendation that dismissal proceedings commence was motivated by Dr. San Filippo's First Amendment activities (App. 6, 44, 44n.26).

By so holding, the Third Circuit has thereby removed the purposeful intent element from a First Amendment retaliatory discharge claim and has substituted a negligence standard as the degree of culpability. Its decision stands in direct conflict with the Court's precedent establishing purposeful intent by the public employer decisionmaker to retaliate against the public employee for his exercise of First Amendment rights as the required degree of culpability.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court held that a public school board which stated that a school teacher's speech on matters of public concern was its express reason for firing him, violated his First Amendment

rights. The simple rationale is that a public employee does not forfeit his First Amendment rights as a citizen to speak on matters of public concern by virtue of his public employment. 391 U.S. at 568. However, a public school board does not forfeit its rights and responsibilities, as a government employer, to promote "the efficiency of the public services it performs through its employees." 391 U.S. at 568. *Pickering* thus prohibits a purposeful intent act: the dismissal of a public employee as punishment or in retaliation for his exercise of First Amendment rights. 391 U.S. at 563. *Pickering* does not impose upon a public school board, as an employer making employment decisions, a special duty to refrain from making adverse employment decisions for reasons other than protected activity as to its employees who incidentally may have engaged in First Amendment activities. *Pickering* does not provide that employees who engage in First Amendment activities are entitled to any different treatment or greater protection, as employees, than employees who have not engaged in First Amendment activities. No duty of care is created by *Pickering*.

Indeed, in a related context, the Court has held that the government does not violate First Amendment or Equal Protection guarantees by selectively prosecuting those who have engaged in wrongful conduct, even though such selective prosecution may incidentally impact First Amendment freedoms and the government is aware of that fact. *Wayte v. United States*, 470 U.S. 598, 610-12 (1985). The Court held that purposeful intent to prosecute for engaging in First Amendment activities is required:

> " 'Discriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." . . . In the present case, petitioner has not shown that the Government prosecuted him *because of*

> his protest activities. Absent such a showing, his claim of selective prosecution fails.

470 U.S. at 610 (emphasis by the Court; internal citations omitted).[3]

In *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274, 285-86 (1977), the Court specifically and expressly rejected a rule of causation that would accord to employees who have engaged in protected First Amendment activities greater protections against legitimately based adverse employment decisions. Thus, the *Mount Healthy* Court placed the burden of proof upon the public employee to establish the purposeful intent element of a First Amendment retaliatory discharge claim. 429 U.S. at 287. Under *Mount Healthy*, a public employee must prove both that he engaged in protected First Amendment activity and that the protected First Amendment activity was a "substantial" or "motivating" factor in the public school board's adverse employment decision. 429 U.S. at 287. Motivation bespeaks conscious and purposeful intent, not negligence.

The *Connick* Court iterated *Pickering*'s prohibition of a public employer's dismissal of an employee *in retaliation for* the employee's engaging in First Amendment activities. 461 U.S. at 146. *Connick* further held, in reliance upon *Pickering*, that when a public employer's discharge of a public employee is not based on that public employee's engaging in protected First Amendment activities, it is unnecessary for the courts to scrutinize the reasons for discharge. 461 U.S. at 146. Other-

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[3] The selective prosecution analysis is directly applicable to this lawsuit. Dr. San Filippo's First Amendment claim actually is both a First Amendment and Equal Protection selective prosecution claim. The Third Circuit noted:

> The parties agree that the analysis is the same under the first amendment and equal protection claims. From this point, we refer to these claims as the first amendment claim.

(App. 13n.6).

wise stated, absent a discharge based on a public employee's engaging in protected First Amendment activities:

> [G]overnmental officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

461 U.S. at 146.

More recently, the Court's opinions in *Waters v. Churchill*, ___ U.S. ___, ___ S. Ct. ___, 128 L.Ed.2d 686 (1994), even though sharply divergent in other respects, reaffirmed the basic principle that purposeful intent is a necessary element of a First Amendment retaliatory discharge claim. As stated in the plurality opinion, the question is whether the public employee was "actually fired because of" protected First Amendment activities, *i.e.*, whether the public employer's "actual motivation" for the discharge was the public employee's protected First Amendment activities. 128 L.Ed.2d at 703 (Opinion of O'Connor, J.). Three other members of the *Waters* Court observed that purposeful intent remains the degree of culpability required to establish a First Amendment retaliatory discharge claim under the Court's precedent. 128 L.Ed.2d at 706 (Opinion of Scalia, J.). Two other members of the *Waters* Court stated: "A violation occurs when a public employee is fired *for* uttering speech on a matter of public concern. . . ." 128 L.Ed. 2d at 714 (Opinion of Stevens, J.) (emphasis added).

The Third Circuit misread, and misapplied to this case, other aspects of the *Waters* opinions. In *Waters*, the public employer acknowledged the reason for the public employee's discharge was her speech; the question was whether the speech was protected or unprotected under the First Amendment. Thus, in *Waters*, where speech was the basis of discharge, four members of the Court would impose upon the employer a duty to make inquiry as to whether the speech was protected or unprotected. Unlike the *Waters* case, Rutgers' Board discharged Dr. San Filippo for the nine acts of mis-

conduct articulated in its written decision, none of which involved First Amendment activities, protected or unprotected. Thus, the Third Circuit has applied the phrase "tread with a certain amount of care" out of context. The precise use of the phrase in the plurality opinion of Justice O'Connor in *Waters* was:

> If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there was a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care.

128 L.Ed.2d at 701.

Contrary to the Court's holdings that a First Amendment retaliatory discharge claim requires a showing that the public employer discharged a public employee with the purposeful intent to retaliate against the public employee because he engaged in protected First Amendment activities, the Third Circuit has imposed a special duty of care that the public employer decisionmaker must fulfill before it can fire an employee for wrongful conduct that is not constitutionally protected.

In the Third Circuit's view, it was not enough that the Board, which actually decided to fire Dr. San Filippo, stated its legitimate reasons therefor in a 60-page decision that was based upon independent fact findings made by an independent hearing panel after 46 days of hearings. It was also not enough that formal dismissal charges were not brought by Rutgers' President until, pursuant to Rutgers' regulations, recommendations for the commencement of dismissal proceedings were made separately by three academic officers and two faculty groups (only one of which was Dr. San Filippo's purportedly ill-motivated department). It was also not enough that not one of the recommendations, charges, or decisions stated or implied that Dr. San Filippo should be dismissed, or that dismissal proceedings should be brought, due to his

alleged First Amendment activities. Rather, the Third Circuit held that once Dr. San Filippo asserted that his department colleagues were motivated by his First Amendment activities in recommending that dismissal proceedings be commenced, the decisionmaking Board was required to do more, *i.e.*, "tread with a certain amount of care." Precisely what more the Board could or should have done remains unspecified.

The decision below provides serious concern to all public employers in the Third Circuit. The amorphous parameters of the special duty imposed by the Third Circuit conjures up a host of potential horrors. A public employer must be prepared to pay for the costly defense through trial of a 42 U.S.C. § 1983 lawsuit whenever it decides, for legitimate reasons, to dismiss an employee who has incidentally engaged in the past in First Amendment activities. Or a public employer must undertake the costly task of leaving no stone unturned in ferreting out the possibility that a nondecisionmaking subordinate may have an unarticulated, unconstitutional motive in seeking a colleague's dismissal. The Third Circuit decision effectively accords a public employee, who has ever engaged in First Amendment activities by design or fortuity, a virtual shield from an adverse employment decision for legitimate reasons.

The big loser if the Third Circuit's decision is allowed to stand is the public that the public entity serves.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on the three questions presented.

Respectfully submitted,

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